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10

11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION
14

15 **Miguel Molina,**

Petitioner,

17 v.

18 **Ben Curry, Warden,**

19 Respondent.
20

C07-3313 MMC

**RESPONDENT'S NOTICE OF MOTION
AND MOTION TO DISMISS;
SUPPORTING MEMORANDUM OF
POINTS AND AUTHORITIES**

Judge: The Honorable Maxine M. Chesney

21 TO PETITIONER MIGUEL MOLINA, IN PRO PER:

22 PLEASE TAKE NOTICE that Respondent moves to dismiss the Petition for Writ of Habeas
23 Corpus, pursuant to 28 U.S.C. § 2254 and Rule 4 of the Rules Governing § 2254 Cases in the
24 United States District Courts, on the ground that the petition is brought beyond the statute of
25 limitations. This motion is based on the notice and motion, the supporting memorandum of
26 points and authorities and exhibits, the petition for writ of habeas corpus, the court records in this
27 action, and other such matters properly before this Court.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 Petitioner Miguel Molina is a California state prisoner proceeding pro per in this matter.
 4 Molina is lawfully in the custody of the California Department of Corrections and Rehabilitation
 5 (CDCR) following his conviction for second-degree murder. (Ex. A, Abstract of Judgment.) In
 6 this Petition, Molina challenges the Governor's February 21, 2003 reversal of his parole grant.
 7 (Pet. at p. 6-a.) This Petition should be dismissed because Molina filed it beyond the one-year
 8 statute of limitations.

9 **ARGUMENT**

10 **THE PETITION SHOULD BE DISMISSED BECAUSE IT WAS FILED**
 11 **AFTER THE ONE-YEAR STATUTE OF LIMITATIONS LAPSED.**

12 The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) applies to all federal
 13 petitions for writs of habeas corpus filed on or after its April 24, 1996 effective date. *Lindh v.*
 14 *Murphy*, 521 U.S. 320, 326 (1997). Accordingly, AEDPA applies to this petition.

15 AEDPA enacted a one-year statute of limitations period during which a § 2254 federal
 16 habeas corpus petition must be filed. 28 U.S.C. § 2244(d)(1). The statute of limitations begins
 17 to run from the latest of four circumstances, 28 U.S.C. § 2244(d)(1), only one of which is
 18 relevant to this case. *See id.*; *Redd v. McGrath*, 343 F.3d 1077, 1079 (9th Cir. 2003) (holding
 19 sub-paragraph D of 28 U.S.C. § 2244(d)(1) applies to a habeas petition challenging an
 20 administrative parole denial). Specifically, the one-year limitations period begins to run one day
 21 after the date the petitioner could have discovered the "factual predicate" of his federal habeas
 22 corpus claim. *Redd*, 343 F.3d at 1082. "[T]he date of the 'factual predicate' . . . is determined
 23 independently of the exhaustion requirement by inquiring when [the petitioner] could have
 24 learned of the factual basis for his claim through the exercise of due diligence." *Id.* In the parole
 25 context, the decision to deny parole is the factual predicate of petitioner's claim that the denial
 26 violated his due process rights. *See id.* (holding that the parole board's decision affirming denial
 27 of parole was factual predicate of petitioner's claim that the decision violated due process).

28 ///

1 Here, Governor Gray Davis reversed the California Board of Prison Terms'¹ decision
 2 granting Molina's parole. (Ex. B, Reversal Letter.) The reversal was documented in a February
 3 21, 2003 letter. (*Id.*) Under *Redd*, the letter is the factual predicate for Molina's claim that the
 4 Governor's decision violated his due process rights. Therefore, the one-year limitations period
 5 began to run the next day, i.e., on February 22, 2003.

6 Molina filed his petition in this Court on June 25, 2007 — over three years after the
 7 limitations period began. Thus, unless the statute of limitations is tolled, Molina's petition is
 8 time barred.

9
 10 **A. Molina Is Not Entitled to Statutory Tolling for His 995-Day Filing Delay.**

11 Under AEDPA, the limitations period is tolled during the pendency of a "properly filed
 12 application for State post-conviction or other collateral review with respect to the pertinent
 13 judgment or claim." 28 U.S.C. § 2244(d)(2). Generally, this means that the one-year statute of
 14 limitations is tolled from the time a California prisoner files his first state habeas petition until
 15 the California Supreme Court rejects his final collateral challenge. *Carey v. Saffold*, 536 U.S.
 16 214, 219-20 (2006). However, the United States Supreme Court has clarified that "only a *timely*
 17 appeal tolls AEDPA's 1-year limitations period," and "in California, 'unreasonable' delays are
 18 not timely." *Evans v. Chavis*, 546 U.S. 189, 197 (2006) (*italics original*) (interpreting holding in
 19 *Saffold*, 536 U.S. 214).

20 In *Chavis*, there was an unexplained six-month delay between the petitioner's California
 21 Court of Appeal denial and his subsequent petition for review to the California Supreme Court.
 22 *Id.* at 201. The Court held that "[s]ix months is far longer than the short periods of time, 30 to 60
 23 days, that most States provide for filing an appeal to the state supreme court. . . . We have found
 24 no authority suggesting, nor found any convincing reason to believe, that California would
 25 consider an unjustified or unexplained 6-month filing delay reasonable." *Id.* (citing *Carey v.*
 26 *Saffold*, 536 U.S. 214, 219 (2002)). Given the absence of clear direction for the term "reasonable
 27

28 1. The Board of Prison Terms has since been renamed as the Board of Prison Hearings.

1 time,” the Court also invested the federal courts with the role of conducting a case-by-case
2 determination to interpret this phrase. *Culver v. Dir. of Corr.*, 450 F.Supp.2d 1137, 1140 (C.D.
3 Cal. 2006) (citing *Chavis*, 126 S.Ct. at 852-53). Accordingly, the Central District recently held
4 that delays of 97 days and 71 days were likewise unreasonable and could not be tolled. *Culver*,
5 450 F. Supp. 2d at 1140-41.

6 Here, Molina originally filed an April 14, 2003 habeas petition in state superior court. (Ex.
7 C, Superior Court Petition.) The superior court granted the petition on September 17, 2003. (Ex.
8 D, Superior Court Order.) The grant of relief was appealed, and on July 22, 2004 the California
9 Court of Appeal reversed the superior court’s decision. (Ex. E, Court of Appeal Opinion, dated
10 July 22, 2004.) Rather than appeal the reversal to the California Supreme Court, Molina waited
11 995 days, then filed his claim in the Court of Appeal — re-contesting the same claim — on April
12 13, 2007. (Ex. F, Court of Appeal Petition.) Thereafter, both the California Court of Appeal and
13 the California Supreme Court summarily denied his claim on April 19, 2007 and June 13, 2007,
14 respectively. (Ex. G, Court of Appeal Denial, dated April 19, 2007; Ex. H, Supreme Court
15 Petition; Ex. I, Supreme Court Denial.)

16 In his federal habeas petition, Molina fails to explain the 995-day delay between the July 22,
17 2004 California Court of Appeal decision and his April 13, 2007 California Court of Appeal
18 petition. Accordingly, the 995-day delay constitutes an unreasonable delay under *Chavis* and
19 *Cutler*, and the law prohibits tolling during this time period.

20 In addition to the 995-day delay, Molina accrued 51 days toward the limitations period
21 before filing his superior court petition (compare February 22, 2003, the start of the limitations
22 period, with superior court petition, dated April 14, 2003 [Ex. C]), and 12 days after the
23 California Supreme Court denial (compare Supreme Court denial, dated June 13, 2007 [Ex. H]
24 with Pet., dated June 25, 2007). Thus, even excluding the applicable tolling periods when
25 Molina’s properly filed state petitions were pending, Molina took 1,058 days to bring his claim to
26 federal court. Accordingly, Molina’s claim is untimely because he exceeded the statute of
27 limitations period by almost two years.

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B. Molina is Not Entitled to Equitable Tolling.

In very rare cases, the one-year statute of limitations for filing a federal habeas petition may be equitably tolled if “extraordinary circumstances beyond a prisoner’s control make it impossible to file a petition on time.” *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003). Equitable tolling “is justified in few cases,” and “the threshold necessary to trigger equitable tolling [under AEDPA] is very high, lest the exceptions swallow the rule.” *Spitsyn*, 345 F.3d at 799 (citing *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002)) (internal quotation marks omitted). The burden is on the petitioner to prove that “extraordinary circumstances were the cause of his untimeliness.” *Stillman v. LaMarque*, 319 F.3d 1199, 1203 (9th Cir. 2003). A pro se petitioner’s lack of legal sophistication is not, by itself, an extraordinary circumstance warranting equitable tolling; nor is an attorney’s general negligence. *Raspberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006); *Frye v. Hickman*, 273 F.3d 1144, 1146 (9th Cir. 2001). Here, Molina has not alleged or otherwise established any circumstances as the cause of his untimeliness. Accordingly, he is not entitled to equitable tolling.

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1 **CONCLUSION**

2 In summary, Molina's petition was filed beyond the one-year statute of limitations; it was
3 untimely by 693 days. The law prevents both statutory and equitable tolling with regard to his
4 unreasonable and unjustified 995-day filing delay. As a result, this Court should dismiss the
5 Petition as untimely.

6 Dated: February 8, 2008

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9 Respectfully submitted;

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Miguel Molina v. Ben Curry, Warden**

Case No.: **C07-3313 MMC**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **February 11, 2008**, I served the attached

RESPONDENT'S NOTICE OF MOTION AND MOTION TO DISMISS; SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Miguel Molina (D-21051)
Correctional Training Facility - East Dorm
P.O. Box 689
Soledad, CA 93960-0689
IN PRO PER

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **February 11, 2008**, at San Francisco, California.

R. Panganiban
Declarant

/S/R. Panganiban
Signature